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July 13, 2011

County Clerk/Registrar of Voters (CC/ROV) Memorandum # 11046

TO: All County Clerks/Registrars of Voters

FROM: 
Lowell Finley, Chief Counsel

RE: Election Procedures: State Budget Mandate Suspensions

On June 30, 2011, Governor Brown signed the state budget and numerous budget-related trailer bills into law.

The main budget bill, SB 87 (Leno), Chapter 33, Statutes of 2011, suspends seven elections-related mandates for the entire 2011-12 fiscal year. These mandates, which are listed beginning on Page 716 of the chaptered version of SB 87, are as follows:

- ☐ Handicapped Voter Access Information Act (Chapter 494, Statutes of 1979)
- ☐ Fifteen-Day Close of Voter Registration (Chapter 899, Statutes of 2000)
- ☐ Absentee Ballots (Chapter 77, Statutes of 1978)
- ☐ Permanent Absent Voters (Chapter 1422, Statutes of 1982)
- ☐ Absentee Ballots – Tabulation by Precinct (Chapter 697, Statutes of 1999)
- ☐ Brendon Maguire Act (Chapter 391, Statutes of 1988)
- ☐ Voter Registration Procedures (Chapter 704, Statutes of 1975)

The chaptered version of SB 87 can be found at www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0051-0100/sb_87_bill_20110630_chaptered.pdf.

What Do the Mandate Suspensions in SB 87 Mean?

The mandate suspensions are in effect only for the 2011-12 fiscal year, meaning no claims will be paid for any costs incurred by county elections officials who choose to voluntarily provide these services during this time frame. County elections officials may still file claims for the cost of complying with these and other mandates in the 2010-11 fiscal year. However, it is likely that payments associated with these claims will be deferred to a future date.

Generally speaking, when a mandate is suspended for a period of time, the local governmental entity is not required to provide the service during that time frame.

There are exceptions to this general rule. The specific language related to mandate suspensions can be found in Government Code section 17581 at

www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=17001-18000&file=17575-17581.5.

It is critically important to remember that each mandate suspension only applies to the reimbursable portion of each mandate and the Commission on State Mandates has already determined what is and is not a reimbursable mandate. County elections officials are still required to carry out the portions of each of the mandates suspended by SB 87 that the Commission has ruled never were or no longer are reimbursable.

Pursuant to Government Code section 17581(b), the state Department of Finance will formally notify each local agency about the mandate suspensions within 30 days of SB 87 being chaptered into law.

Based on a reading of the laws in question and the rulings (in the form of a "Test Claim Statement of Decision," "Parameters and Guidelines," or "Claiming Instructions") issued by the Commission on State Mandates or the State Controller's office, following is the Secretary of State's view of what each of the elections-related mandate suspensions contained in SB 87 means to voters and county elections officials for the 2011-12 fiscal year.

Handicapped Voter Access Information Act (Chapter 494, Statutes of 1979)

SB 87 has no practical effect on the law requiring county elections officials to inform voters whether their polling place is accessible to voters with disabilities, that they have the right to receive assistance in marking their ballot, and to survey polling places to determine whether they are accessible to voters with disabilities.

While the state mandate to provide this information and conduct these tasks is suspended under SB 87, similar requirements are imposed by the 1984 Voting Accessibility for the Elderly and Handicapped Act 42 USC Section 1973ee, et seq., which can be found at www.sos.ca.gov/elections/polling-place-accessibility/guidelines/appendix-a-voting-accessibility-for-the-elderly-and-handicapped-act.pdf. Section 3 of the Act requires polling places to be accessible in all federal elections, while Section 5 requires registration and voting aids for voters with specific needs and elderly individuals, including instructions to be printed in large type and be conspicuously displayed at each polling place and permanent registration facility.

Under Government Code section 17556(c), a state statute or executive order does not impose a reimbursable state mandate if it imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. This rule applies regardless of whether the federal law or regulation was enacted or adopted prior to or after the date on which the state statute or executive order was enacted or issued.

As a result, county elections officials must continue to inform voters whether their polling place is accessible to voters with disabilities, that they have the right to receive

assistance in marking their ballot, and to survey polling places to determine whether they are accessible to voters with disabilities.

Fifteen-Day Close of Voter Registration (Chapter 899, Statutes of 2000)

SB 87 has no effect on the law that requires county elections officials to allow qualified affiants to register to vote 15 days prior to an election. (Elections Code section 2102.)

The Commission on State Mandates determined in 2006 that the reimbursable mandate portion of this law was limited to the one-time expense of redesigning or acquiring computer software to alter the polling place notices sent to affiants who registered to vote between the 29th and the 15th day before the election.

The Commission denied all other claims filed by county elections officials, concluding other provisions of the law did not mandate a new program, a higher level of service, or require county elections officials to bear a cost that had previously been borne by the state.

As a result, county elections officials must continue to allow qualified affiants to register to vote 15 days prior to an election.

Absentee Ballots (Chapter 77, Statutes of 1978)

SB 87 suspends the requirement that county elections officials provide an absentee (known now as vote-by-mail) ballot to any voter who requests one.

However, SB 87's suspension of this mandate has no effect on the law in effect prior to the passage of the no-fault vote-by-mail statute, which required county elections officials to make vote-by-mail ballots available to voters who:

- ☐ Are ill,
- ☐ Will be absent from their precinct on Election Day,
- ☐ Have a physical disability,
- ☐ Have conflicting religious commitments, or
- ☐ Live more than ten miles from their polling place.

As a result, county elections must provide vote-by-mail ballots to voters who fall into any one of the categories noted above without state reimbursement. County elections officials have the option of providing vote-by-mail ballots to any voter who requests one for any reason, but if they do, they will not be reimbursed for the cost of doing so in the 2011-12 fiscal year.

While the Secretary of State cannot require county elections officials to exercise the option noted above and provide vote-by-mail ballots to any registered voter who requests one, doing so will provide a benefit to voters and will likely save county elections officials money in the current and future fiscal years.

Permanent Absent Voters (Chapter 1422, Statutes of 1982)

This issue is somewhat complex as a result of SB 87's suspension of Chapter 77, Statutes of 1978 (described above), previous actions by the Commission on State Mandates, and changes in state law related to permanent absent (known now as permanent vote-by-mail) voters.

SB 87 suspends Chapter 1422, Statutes of 1982. This measure required county elections officials to allow anyone who provided evidence of a physical disability to register as a permanent vote-by-mail voter, to mail that voter a ballot before each election, to maintain a list of those voters, and to remove voters from that list in certain circumstances.

The Commission on State Mandates ruled in a 1989 decision commonly referred to as Permanent Absent Voter I (PAV I) that Chapter 1422, Statutes of 1982, created a reimbursable state mandate. The 1989 Statement of Decision can be found at www.csm.ca.gov/sodscan/4358-1sod.pdf, while 1990 Parameters and Guidelines issued to clarify the Statement of Decision can be found at www.csm.ca.gov/sodscan/4358-1pg.pdf.

A subsequent measure, Chapter 922, Statutes of 2001, required county elections officials to allow any registered voter to register as a permanent vote-by-mail voter, to maintain a list of voters who are registered as permanent vote-by-mail voters, and to delete any voter from the list in certain circumstances. This statute does not require that a vote-by-mail ballot automatically be mailed to someone who registers as a permanent vote-by-mail voter.

The Commission on State Mandates issued a 2006 Statement of Decision commonly referred to as Permanent Absent Voter II (PAV II), which can be found at www.csm.ca.gov/sodscan/03tc11sod.pdf. However, because no Parameters and Guidelines have been issued in association with the Statement of Decision, no county elections official can file a claim related to this statute.

SB 87 did not suspend Chapter 922, Statutes of 2001, and because that statute has not been suspended, county elections officials are required to comply with all of its provisions. However, county elections officials are not entitled to file reimbursement claims for that compliance, because as noted above, the Commission on State Mandates has not adopted the Parameters and Guidelines necessary to implement its 2006 Statement of Decision.

As a result, county elections officials must continue to allow any voter to register as a permanent vote-by-mail voter, to maintain a list of voters who are registered as permanent vote-by-mail voters, and to delete any voter from the list in certain circumstances. However, due to the suspension of Chapter 1422, Statutes of 1982, and Chapter 77, Statutes of 1978, county elections officials are not required to send vote-by-mail ballots to any voter registered as a permanent vote-by-mail voter unless that voter falls into one of the five categories noted in the section above entitled Absentee Ballots (Chapter 77, Statutes of 1978). County elections officials have the

option of automatically mailing vote-by-mail ballots to all voters who have registered as permanent vote-by-mail voters, but if they do, they will not be reimbursed for the cost of doing so in the 2011-12 fiscal year.

While the Secretary of State cannot require county elections officials to exercise the option noted above and mail a vote-by-mail ballot to any voter who is registered as a permanent vote-by-mail voter, doing so will provide a benefit to voters and will likely save county elections officials money in the current and future fiscal years.

Absentee Ballots – Tabulation by Precinct (Chapter 697, Statutes of 1999)

SB 87 has no effect on the law requiring county elections officials to tabulate and report absentee (known now as vote-by-mail) and polling place ballots by precinct. (Elections Code section 15321.)

That is because the Commission on State Mandates has ruled previously that this is no longer a reimbursable state mandate.

However, SB 87 suspends the mandate requiring county elections officials to maintain an accurate list of all voters, including their precincts, who have received and voted a vote-by-mail ballot. (Elections Code section 15111.)

As a result, county elections officials must continue to tabulate and report vote-by-mail and polling place ballots and report them by precinct. County elections officials have the option of maintaining an accurate list of all voters, including their precincts, who have received and voted a vote-by-mail ballot, but if they do, they will not be reimbursed for the cost of doing so in the 2011-12 fiscal year.

Brendon Maguire Act (Chapter 391, Statutes of 1988)

SB 87 suspends the law requiring an election to be cancelled and a special election to be held in one particular circumstance. (Elections Code sections 8026, 8027, 14106, and 14203.)

Section 8026 states that if there are only two candidates (one of whom is the incumbent) on the ballot for a nonpartisan office, that election shall be cancelled if either candidate dies 68 or fewer days prior to Election Day and a special election shall be held at a later date. This does not apply to judicial elections.

Section 8027 requires the nomination period to be re-opened should either of the two candidates in Section 8026 die after the 88th but before the 68th day before the election.

Section 14106 requires elections officials to include, as part of a polling place supply kit, signs or materials to make signs advising voters that an election has been cancelled pursuant to Section 8026.

Section 14203 requires the signs mandated by Section 14106 to be posted in specific locations.

As a result, county elections officials have the option of adhering to the Brendon Maguire Act should the circumstances above be met, but if they do, they will not be reimbursed for the cost of doing so in the 2011-12 fiscal year. If a county elections official does not adhere to the Brendon Maguire Act and should the deceased candidate receive the most votes, a special election will be conducted pursuant to the standard procedures set forth in Elections Code section 15402.

While the Secretary of State cannot preclude county elections officials from exercising the option above and applying the Brendon Maguire Act, if each county chooses to follow the process set forth in Elections Code section 15402, it will ensure a consistent application of the law across the state and will likely save county elections officials money in the current and future fiscal years.

Voter Registration Procedures (Chapter 704, Statutes of 1975)

Under the law, the Secretary of State pays to print voter registration cards and pays for the return postage on the cards when the person wishing to register to vote mails the card to the state or their county elections official. (Elections Code sections 2157(a)(8), 2161, 2164(a)(2).) SB 87 has no effect on these requirements and the Secretary of State will continue to provide these services.

SB 87 suspends the laws requiring county elections officials to design and conduct outreach efforts to identify unregistered, eligible citizens and register them to vote. (Elections Codes sections 2103, 2105, 2130; California Code of Regulations, title 2, sections 20000-20005.)

SB 87 also suspends the law requiring county elections officials to process certain types of mail-in voter registration cards. However, county elections officials must continue to process other types of voter registration cards received by mail and all voter registration cards received in person.

The Commission on State Mandates has ruled the State Controller's office must reimburse county elections officials for the state mandated costs associated with processing voter registration cards. For a number of years, a formula adopted by the State Controller's office has been used to reimburse county elections officials for those costs.

For the 2011-12 fiscal year, SB 87 suspends the requirement that county elections officials be reimbursed for the cost of processing voter registration cards that are provided directly to affiants by the county or the state and are delivered back to the county elections official by mail. (Elections Code section 2101(a)(1).) The practical effect is that county elections officials are not required to process these voter registration cards when they receive them in the mail from voters or from the Secretary of State's office.

However, county elections officials must continue to offer in-person registration services to all in-state eligible citizens and must process all voter registration cards that they

receive in person, directly from voters or third-party registration drives. (Elections Code sections 2102(a)(3), 2158(a).)

SB 87 has no effect on the requirement to process voter registration cards that county elections officials receive under federal law, regardless of whether those voter registration cards are returned in person or by mail.

This means the following voter registration cards and forms that are returned in person or by mail must be processed by county elections officials, regardless of whether reimbursement is provided:

- ❑ Registrations completed on the federal voter registration form. (42 U.S.C. 1973gg-4(a)(1); Elections Code section 2102.)
- ❑ Registrations completed on the state voter registration form that originated from a state agency that is required to provide voter registration services by the National Voter Registration Act (NVRA). This includes the Department of Motor Vehicles, public assistance agencies, state-funded agencies serving people with disabilities, the Franchise Tax Board, the Board of Equalization, and many other entities. Information related to the NVRA can be found at www.sos.ca.gov/elections/nvra/. How a county elections official determines the origin of each form is up to the county elections official. Presumably, this determination will be based on the serial numbers of the voter registration cards provided by county elections officials to the NVRA agencies. (42 U.S.C. 1973gg-4(a)(2); Elections Code section 2102(a)(2).)
- ❑ Registrations from special absentee voters (those described in Elections Code sections 3100-3112) and federal absentee voters (those described in Elections Code sections 3300-3311) pursuant to the federal Uniformed and Overseas Citizens Absentee Voting Act, as amended by the Military and Overseas Voter Empowerment Act. This requirement can be found at <http://codes.lp.findlaw.com/uscode/42/20/I-G/1973ff-1>.

As a result, county elections officials are required to process all voter registration cards noted in the list above that are received by mail, as well as all registration cards received in person, regardless of their origin.

County elections officials have the option of processing voter registration cards that affiants obtained directly from the county, the state, or any other non-NVRA agency and are delivered back to the county elections office by mail. County elections officials who provide this service to voters will not be reimbursed for the cost of doing so in the 2011-12 fiscal year.

While the Secretary of State cannot require county elections officials to exercise the option noted above to process all voter registration forms received by mail, doing so will provide a benefit to voters and will ensure people who are legally eligible to register to vote are treated equally in all of California's 58 counties.

Elections Code section 2153 requires county elections officials to contact anyone attempting to register to vote if their registration card is incomplete and to provide such a person with the opportunity to complete their voter registration card.

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If a county elections official chooses not to exercise the option noted above, the Secretary of State strongly urges the county elections official to, in the spirit of Elections Code section 2153, contact those whose voter registration cards will not be processed and provide them with options for submitting a voter registration card that the county elections official will process.

If you have any questions, please feel free to contact me at (916) 653-7244 or Lowell.Finley@sos.ca.gov.